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46797 7590 02/10/2009 IBM CORPORATION, INTELLECTUAL PROPERTY LAW DEPT 917, BLDG. 006-1 3605 HIGHWAY 52 NORTH ROCHESTER, MN 55901-7829			EXAMINER VU, NGOC K	
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ERIC LAWRENCE BARSNESS, CARY LEE BATES,
PAUL REUBEN DAY, ROBERT RICHARD RASCH,
and JOHN MATTHEW SANTOSUOSO

Appeal 2008-5844
Application 09/903,350
Technology Center 2400

Decided:¹ February 10, 2009

Before JOHN A. JEFFERY, KARL D. EASTHOM, and ELENI MANTIS
MERCADER, *Administrative Patent Judges*.

JEFFERY, *Administrative Patent Judge*.

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 CFR § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134 from the Examiner's rejection of claims 3, 7-11, 24, and 27. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

Appellants invented a method for providing viewership information to television viewers. To this end, viewership data is collected from multiple viewers, processed, and ultimately transmitted to end-user receivers. The transmitted data can represent a growth rate of viewers for a particular program.² Claim 3 is illustrative:

3. A method for providing viewership information to a plurality of television viewers, comprising:

collecting viewership data of a plurality of viewers, wherein the viewership data comprises a plurality of counts corresponding to a plurality of time intervals for each program, and wherein each count represents a number of viewers of a respective program during a respective time interval;

processing the viewership data to provide on-screen interface information; and

transmitting, to a plurality of end-user receivers, the on-screen interface information and data for an electronic program guide, wherein the on-screen interface information is viewable in one or more graphical representations of the plurality of counts displayed along with each respective program entry displayed by the electronic program guide on displays connected to the plurality of end-user receivers, wherein transmitting the on-screen interface information further comprises transmitting data representing a growth rate of viewers for a particular program.

² See generally Abstract; Spec. ¶¶ 0005-09.

The Examiner relies on the following prior art reference to show unpatentability:

Berezowski US 2002/0056087 A1 May 9, 2002
(filed Mar. 30, 2001)

The Examiner rejected claims 3, 7-11, 24, and 27 under 35 U.S.C. § 102(e) as anticipated by Berezowski (Ans. 3-7).

Rather than repeat the arguments of Appellants or the Examiner, we refer to the Brief and the Answer³ for their respective details. In this decision, we have considered only those arguments actually made by Appellants. Arguments which Appellants could have made but did not make in the Brief have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Regarding representative claim 3,⁴ Appellants argue that Berezowski fails to disclose transmitting on-screen guide information including a *growth rate* of viewers for a particular program as claimed. Appellants emphasize that Berezowski does not teach the recited growth rate which refers to an increase in the size of an audience per unit time (Br. 13; emphasis added). The Examiner takes the position that users can determine the change in size of an audience in Berezowski by merely comparing the displayed audience information for a particular program at two different times (Ans. 8).

³ Throughout this opinion, we refer to the Appeal Brief filed Mar. 8, 2007 and the Examiner's Answer mailed July 25, 2007.

⁴ Appellants argue independent claims 3, 24, and 27 together as a group. *See* Br. 12-13. Accordingly, we select claim 3 as representative. *See* 37 C.F.R. § 41.37(c)(1)(vii).

Regarding representative claim 7,⁵ Appellants argue that Berezowski fails to disclose transmitting on-screen interface information as claimed, namely transmitting group information *identifying group members of the identified group* of end-user receivers from which viewership data is collected. According to Appellants, the Specification of the present application indicates that group members may be identified “by name, initials or other descriptors,” but Berezowski merely teaches displaying a number of viewers in a zip code that are watching a particular show. As such, Appellants contend, Berezowski does not identify individual members of the group (Br. 13).

The Examiner, however, takes the position that this limitation is fully met by Berezowski since location-based audience information is provided for a particular program (i.e., based on viewers in the same zip code, or other regional or national data) (Ans. 9).

The issues before us, then, are as follows:

ISSUES

Under § 102, have Appellants shown that the Examiner erred in finding that Berezowski transmits:

(1) on-screen interface information comprising data representing a growth rate of viewers for a particular program in rejecting representative claim 3; and

⁵ Appellants argue independent claim 7 separately, but do not separately argue dependent claims 8-11. *See* Br. 13. Accordingly, we group these claims together and select claim 7 as representative.

(2) group information identifying group members of an identified group of end-user receivers from which viewership data is collected in rejecting representative claim 7?

FINDINGS OF FACT

The record supports the following findings of fact (FF) by a preponderance of the evidence:

1. Berezowski discloses audience measuring systems for personal video recording systems and interactive television applications that provide audience information to users (Berezowski, Abstract; ¶ 0002).

2. Audience information is provided to the user in various forms including, among other things, overlaying the information onto the program the user is watching or displaying the information when the user selects an audience information icon 550. This audience information can relate to the user's current video or application (Berezowski, ¶ 0072; Fig. 5).

3. Audience information can include, among other things, the audience size or market share for a particular program, or any other suitable information related to the program's audience (Berezowski, ¶ 0073).

4. Berezowski in Figure 6 shows a display 600 that provides the user with the size of the audience for a currently-viewed program in real time. The display graphically illustrates (e.g., via a pie chart 605) information pertaining to the number of users watching a particular program (i.e., "Mad About You") compared with other programs for a particular time slot (Berezowski; ¶ 0074; Fig. 6).

5. Berezowski in Figure 16 shows a display 1700 that provides the user with audience information for a particular program ("I Love Lucy")

with respect to viewers in the same zip code. The user may also select audience information based on (1) national data; (2) regional data; or (3) market data (Berezowski, ¶ 0089; Fig. 16).

6. The user in Berezowski can also select audience information based on certain demographic information which may be based, at least in part, on identifying information or information from user profiles (Berezowski, ¶ 0089).

7. The Specification of the present application indicates that “[t]he viewing members may be represented by name, initials or other descriptors” (Spec. ¶ 0069).

PRINCIPLES OF LAW

Anticipation is established only when a single prior art reference discloses, expressly or under the principles of inherency, each and every element of a claimed invention as well as disclosing structure which is capable of performing the recited functional limitations. *RCA Corp. v. Appl. Dig. Data Sys., Inc.*, 730 F.2d 1440, 1444 (Fed. Cir. 1984); *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1554 (Fed. Cir. 1983).

During patent examination, a claim is given its broadest reasonable construction “in light of the specification as it would be interpreted by one of ordinary skill in the art.” *In re Am. Acad. Of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). However, such an interpretation must not import limitations from the specification into the claims. “[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments....[C]laims may embrace different subject matter than is

illustrated in the specific embodiments in the specification.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005) (en banc) (citations and internal quotation marks omitted).

ANALYSIS

Claims 3, 24, and 27

Based on the record before us, we find no error in the Examiner’s anticipation rejection of representative claim 3 which calls for, in pertinent part, transmitting on-screen interface information comprising data *representing* a growth rate of viewers for a particular program. We note at the outset that, as a general proposition, merely reciting what data represents essentially constitutes non-functional descriptive material as it does not further limit the claimed invention either functionally or structurally. Such non-functional descriptive material does not patentably distinguish over prior art that otherwise renders the claims unpatentable.⁶

Nevertheless, we find that Berezowski still fully meets this limitation. While Berezowski may not expressly indicate that the audience information presented to user represents a growth rate of viewers for a particular program, Berezowski nonetheless at least implicitly teaches this feature.

Berezowski’s display in Figure 6 provides the user with comparative information regarding the size of the audience for a currently-viewed program *in real time* (FF 4). As such, this information will update in real time to indicate the current audience information as the program progresses.

⁶ See *In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004); see also *Ex parte Nehls*, No. 2007-1823, slip op. at 11-17 (BPAI Jan. 28, 2008) (precedential), available at <http://www.uspto.gov/web/offices/dcom/bpai/prec/fd071823.pdf> (discussing cases pertaining to non-functional descriptive material).

These updates would, at a minimum, provide data representing a change in viewership at least with respect to the time periods between updates (i.e., the data would represent a “growth rate” of viewers—even if negative or zero). Moreover, since the currently-viewed program is shown in a finite, predetermined time period, this displayed real-time audience information (and the resulting changes in that information) would also represent a growth rate of viewers for the duration of the program.

For the foregoing reasons, Appellants have not persuaded us of error in the Examiner’s rejection of representative claim 3. Therefore, we will sustain the Examiner’s rejection of that claim, and claims 24 and 27 which fall with claim 3.

Claims 7-11

We also find no error in the Examiner’s anticipation rejection of representative claim 7 which calls for, in pertinent part, transmitting group information *identifying* group members of an identified group of end-user receivers from which viewership data is collected.

First, Appellants’ contention that Berezowski does not identify *individual* members of the group (Br. 13) is not commensurate with the scope of the claim. Claim 7 does not require identifying the *individual* members, but rather more broadly recites “identifying group members of the defined group.” Although the Specification does indicate that “[t]he viewing members may be represented by name, initials or other descriptors” (FF 7) as Appellants argue,⁷ the claim is not so limited and we decline to import

⁷ Although Appellants indicate that this passage appears in Paragraph 0071 of the Specification (Br. 13), it actually appears in Paragraph 0069.

this description into the claims. *See Phillips*, 415 F.3d at 1323. But even if we were to limit the claim to this description, we note the generic, open-ended term “or other descriptors” does not preclude the Examiner’s interpretation of the identification information in Berezowski.

Berezowski provides audience information based on information that would, at least broadly, identify members of a group. For example, Berezowski can tailor the displayed audience information for a particular program with respect to a particular location (FF 5) or demographic (FF 6). This displayed information would, in effect, identify viewers in a particular location or with certain demographic characteristics from the group of viewers watching that particular program. That such information can be derived from identifying information or user profiles (FF 6) only bolsters this conclusion.

For the foregoing reasons, Appellants have not persuaded us of error in the Examiner’s rejection of representative claim 7. Therefore, we will sustain the Examiner’s rejection of that claim, and claims 8-11 which fall with claim 7.

CONCLUSION

Appellants have not shown that the Examiner erred in rejecting claims 3, 7-11, 24, and 27 under § 102.

ORDER

The Examiner’s decision rejecting claims 3, 7-11, 24, and 27 is affirmed.

Appeal 2008-5844
Application 09/903,350

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

ELD

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